IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 549 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE D.P.BUCH sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TRIKAMBHAI DEEPABHAI PARMAR

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 549 of 1993

MR MJ BUDDHBHATTI for Petitioner No. 1

Mr.KP RAVAL, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 26/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. The appellant - accused has filed this Appeal, through Jail, challenging the impugned Judgment and order of conviction and sentence dated 20.3.1993 passed by the learned Addl. Sessions Judge, Kheda at Anand, in Sessions Case No.217 of 1991, whereby the learned Judge convicted the appellant - accused for the offence u/s.302 of Indian Penal Code and sentenced him to suffer Life Imprisonment and to pay fine of Rs.1000/- i/d. to further under-go R.I. for one month.

2. Mr.Budhbhatti, learned Counsel, appointed, for the appellant - accused, in his usual fairness straightway conceded that he is not in a position to challenge the order of conviction passed by the learned Additional Sessions Judge because of the direct evidence of 2 eye witnesses, viz. Melabhai Lakhabhai, Ex.17, P.W.3 and Sagram Dhulabhai, Ex.18, P.W. 4. He could not dispute the incident in question taking place wherein the appellant - accused caused death of deceased Shardul with Dharia. However, his only submission was that on the facts of this case the learned Judge was in complete error in convicting the appellant - accused for the major offence u/s. 302 I.P.Code. According to him, it would be a case u/s.304 Part-I I.P.Code and not u/s.302 I.P.Code and the Jail record of the appellant - accused shows that he has in all under-gone sentence of more than 8 years and 6 months and therefore the order regarding sentence has already under-gone be passed.

3. Whether it would be a case u/s.302 I.P.Code or u/s.304 Part-I I.P.Code, we have to consider the salient features of the case, which are as under :

Admittedly, no previous enmity between the accused and the witnesses or the deceased is established in this case. The incident in question took place just near the field of the accused. Other accused has been acquitted by the trial Court for instigating the appellant accused. It has come in the evidence that Sagram Dhula that there was a standing crop in the field of the accused. Along with the appellant - accused another accused Chandubhai Dipabhai was also tried for the offence u/ss. 302, 504, 34 and in the alternative Section 104 of the I.P.Code, for instigating the present appellant - accused, who has been given benefit of doubt by the learned Judge and acquitted him. As per the evidence of prosecution witness Melabhai Lakhabhai, Ex.17, when they were grazing their cattle in Gauchar land both the accused Tika Dipa and Chandu Dipa came

there and asked them why they are grazing their cows there ? The deceased Shardul told that they are grazing their cows on the Government land and they should not object to it. Thereupon another accused Chandu Dipa abused them. Therefore, he asked him why he was abusing. Thereupon present appellant accused Tika Dipa gave Dharia blow on the head of deceased Shardul and thereafter both the accused ran away. This witness has admitted in the cross examination that against him and witness Sagram Ex.18 cases have been filed in Umreth Court by many persons for grazing the cattle in their fields. Similarly Bharoda police has also filed case against him. He had not tried to intervene when the accused gave Dharia blow to Shardul nor they had tried to chase the accused and after giving one blow both the accused ran away from the place of incident. Similarly Sagram Dhula, Ex.18, has also stated in his evidence that how the incident was occurred. He has admitted in his cross examination that near the place of incident there are fields of both the accused Tika Dipa (present appellant) and Chandu Dipa, and in some fields there was standing crop. However, he has denied the suggestion made to him that against him also several cases have been registered for grazing their cattle in the fields of others. He has also denied the suggestion made to him that they were trying to graze the land in the field therefore watchman gave dharia blow to Shardul. Both these witnesses have admitted in their cross examination that they were armed with sticks. They were in all 3, whereas accused were 2. They are from Bharwad community. Therefore, we are not prepared to believe their version that deceased Shardul was not having stick with him at the time of incident.

4. From the facts of this case we are fully convinced that the prosecution has not come with real story. It clearly appears that tome hot exchange of word must have taken place between the accused as well as the deceased and the prosecution witnesses at the time of incident when the accused were trying to prevent the deceased and other prosecution witnesses from grazing their cattle near their field or in their field and in hot of movement the present appellant - accused must have given only one blow. The very fact that he restrained himself after giving one blow and ran away shows that it cannot be a case u/s.302 I.P.Code and it would be a case u/s.304 Part-I I.P.Code.

5. However, learned A.P.P. Shri Raval for the respondent - State vehemently submitted that looking to the injury received by deceased Shardul it cannot be said that the accused had committed offence u/s.304 Part-I

I.P.Code. According to him, though it was a case of solitary blow, but it was sufficient in ordinary course to cause the death of the deceased and therefore the learned Judge has rightly convicted the present appellant - accused for the offence u/s.302 I.P.Code. On the facts of this case we are not prepared to accept the submission made by Shri Raval. It may be stated that though the injury was serious the deceased succumbed to the injury only after 3 days of incident.

6. In view of above discussion we are of the considered opinion that the learned Judge has rightly come to the conclusion that the appellant - accused has caused the death of deceased Shardul by giving dharia blow on his head on 24.2.1991, but it would not be a case u/s.302 I.P.Code for the reasons stated earlier and in our considered opinion it would be a case u/s. 304 Part-I I.P.Code. Accordingly, we alter the order of conviction from Section 302 I.P.Code into Section 304 Part-I I.P.Code and convict the accused for the offence u/s.304 Part-I I.P.Code.

7. This brings us to the sentence. What sentence should be imposed against the appellant - accused. No doubt it is true that the appellant - accused can be convicted with life imprisonment for the offence u/s.304 Part-I I.P.Code also, but having regard to the peculiar facts and circumstances of the case the appellant accused by now has under-gone sentence of about 8 years and he has earned remission of 2 years sentence as per the policy declared by the Government and he was hardly 22 years old at the time of incident we are of the considered opinion that the sentence which has already under-gone by now would be the sufficient sentence.

8. For the reasons stated above, the Appeal is partly allowed to the aforesaid extent. Accordingly, we pass the order of sentence which has already under-gone by the appellant - accused for the offence u/s.304 Part-I I.P.Code. The appellant - accused is set at liberty forthwith if he is not required is any other case. Fine if paid be refunded to the appellant accused.

sd/-

(B.J.Shethna,J.)

Date : December 26, 2001 sd/-

(D.P.Buch, J.)

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